

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

C.A. NO. 05-10489-MEL

GLENN S. BATES,

Plaintiff

v.

TOWN OF HARWICH AND HARWICH  
POLICE DEPARTMENT, CHRISTOPHER  
KENDER, AND BARRY MITCHELL,

Defendants

DEFENDANTS CHRISTOPHER  
KENDER AND BARRY MITCHELL'S  
MOTION TO COMPEL  
DISCOVERY RESPONSES

Now come defendants Christopher Kender and Barry Mitchell ("Kender and Mitchell"), and hereby move, pursuant to Fed.R.Civ.P. 37(a)(2)(B) and Local Rule 37.1, that this Honorable Court issue an order, compelling plaintiff to serve Answers to said defendants' Interrogatories, which were served on July 5, 2005. As grounds therefor, said defendants state as follows:

1. The Complaint in this action was removed to this Court on March 14, 2005.
2. On July 5, 2005, counsel for defendants Kender and Mitchell served upon plaintiff: (a) said defendants' Voluntary Disclosure of Discoverable Information; (b) said defendants' First Set of Interrogatories; and (c) said defendants' First Request for Production of Documents. Exhibit A.
3. Pursuant to Fed.R.Civ.P. 33(b)(3) and 34(b), plaintiff's responses to the Interrogatories and Request for Production of Documents were due on or about August 4, 2005. On September 21, 2005, plaintiff, having not yet responded to the discovery requests, requested and received an additional 30 days in which to respond to discovery, thereby making discovery due on or about October 21, 2005. Exhibit B.

4. On November 4, 2005, having received no response to the Interrogatories, defense counsel contacted plaintiff's counsel by telephone to inquire as to the status of said response. Plaintiff's counsel informed defense counsel that he was attempting to contact his client in order to prepare the responses.

5. On November 17, 2005, defense counsel again contacted plaintiff's counsel by telephone to inquire as to the status of plaintiff's Answers to Interrogatories. Plaintiff's counsel again informed defense counsel that he was attempting to contact his client in order to prepare the responses.

6. On January 19, 2006, defense counsel wrote to plaintiff's counsel, noting plaintiff's failure to provide Answers to Interrogatories. Said letter explicitly served as a conferral, pursuant to Local Rules 7.1(A)(2) and 37.1(A), regarding the defendants' intent to file a Motion to Compel. Exhibit C.

7. On January 19, 2006, plaintiff's counsel responded to defense counsel's January 19, 2006 letter in writing, stating that "with respect to interrogatories, this is the first I am hearing that you believe that the interrogatories are an issue. In any event, they shall be produced before plaintiff's deposition." Exhibit D.

8. The statement of plaintiff's counsel that "this is the first I am hearing" of the interrogatories issue conflicts with the two telephone conversations regarding the issue between plaintiff's counsel and defense counsel.<sup>1</sup>

9. In any event, plaintiff's counsel did not produce Answers to Interrogatories prior to plaintiff's deposition, which was held on February 9, 2006.

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<sup>1</sup>The telephone conversations were held with plaintiff's counsel Gregory T. Donoghue, while the response to the January 19, 2006 letter was written by plaintiff's counsel Timothy J. Perry. Both attorneys work for the law firm of PretiFlaherty.

10. As of the date of the filing of this motion, more than eight months had passed since Kender and Mitchell served Interrogatories upon plaintiff, yet plaintiff had failed to serve Answers to Interrogatories.

11. Accordingly, Kender and Mitchell seek an order, compelling plaintiff to provide Answers to said defendants' Interrogatories, within 14 days of such order.

WHEREFORE, defendants Kender and Mitchell request that this Court issue an order, compelling plaintiff to provide Answers to said defendants' Interrogatories, within 14 days of such order.

DEFENDANTS,

CHRISTOPHER KENDER and  
BARRY MITCHELL,

By their attorneys,

/s/Jackie Cowin  
Joseph L. Tehan, Jr. (BBO# 494020)  
Jackie Cowin (BBO# 655880)  
Kopelman and Paige, P.C.  
Town Counsel  
101 Arch Street  
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267003/Metg/0629

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JEFFREY T. BLAKE  
R. ERIC SLAGLE  
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PETER L. MELLO

July 5, 2005

Timothy J. Perry, Esq.  
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10 High Street, Suite 502  
Boston, MA 02105

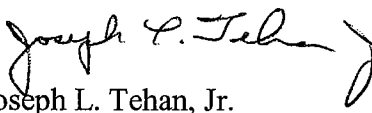
Re: Glenn S. Bates v. Town of Harwich, et al.  
U.S. District Court C.A. No. 05-10489-MEL

Dear Mr. Perry:

Enclosed relative to the above-captioned case, please find:

1. Defendants Christopher Kender and Barry Mitchell's First Set of Interrogatories to Plaintiff Glenn S. Bates;
2. Defendants Christopher Kender and Barry Mitchell's First Request for Production of Documents to Plaintiff Glenn S. Bates;
3. Defendants Christopher Kender and Barry Mitchell's Disclosure of Discoverable Information Pursuant to Fed.R.Civ.P 26(a)(1); and
4. Defendants Christopher Kender and Barry Mitchell's First Request for Admissions to Plaintiff Glenn S. Bates.

Very truly yours,

  
Joseph L. Tehan, Jr.

JLT/er

Enc.

cc: Charles D. Mulcahy, Esq. (w/enc.)  
Andrew P. Shepley (GFMS # 228757) (w/enc.)

255429/METG/0629

SEP 22 2005

**PretiFlaherty**

TIMOTHY J. PERRY  
[tperry@preti.com](mailto:tperry@preti.com)

September 21, 2005

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90 New State Highway  
Raynham, MA 02767

Joseph L. Tehan, Jr.  
Kopelman & Page, PC  
31 St. James Avenue  
Boston, MA 02116-4102

Re: Bates v. Town of Harwich et al.  
CA No.: 1:05-cv-10489MEL

Dear Mr. Mulcahy and Mr. Tehan:

I am in receipt of your discovery requests and, via this letter, I am requesting an additional thirty days to respond to same. I apologize for the delay but an unexpectedly busy trial schedule this summer resulted in a backlog of discovery. If I hear no response to the contrary, I shall take that to mean that you have granted my request.

Thank you for your time and anticipated cooperation. Please call me with any questions.

Very truly yours,



Timothy J. Perry

file

LEONARD KOPELMAN  
DONALD G. PAIGE  
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January 19, 2006

BY FACSIMILE – 617-226-3801

Timothy J. Perry, Esq.  
Preti, Flaherty, Beliveau, Pachios & Haley, LLP  
10 High Street, Fifth Floor  
Boston, MA 02109

Re: Glenn S. Bates v. Town of Harwich, et al.  
U.S. District Court C.A. No. 05-10489-MEL

Dear Mr. Perry:

I am writing as a follow-up to our telephone conversation today concerning plaintiff's deposition and my subsequent receipt of your letter concerning same.

As we discussed, the case docket (#23) reflects an order of the United States District Court setting the deposition for January 23, 2006 at 10:00 a.m. at the federal courthouse, a date, time and location which all parties represented to the court as mutually acceptable. The attempted rescheduling of this deposition, ordered more than a month ago, at the last minute, in contravention of that order, reflects a pattern of non-compliance with legitimate discovery requests, as evidenced by plaintiff's failure to provide any documents in response to the defendants' requests for production and failure to answer interrogatories, both of which were propounded on July 5, 2005. Accordingly, please view this letter as an L.R. 7.1(A)(2), and L.R. 37.1(A) attempt to confer as predicate to a Motion to Compel Written Discovery responses.

It remains my intention to comply with the court order, and as I advised you in our discussion, I shall appear as scheduled for the deposition.

**EXHIBIT C**

**KOPELMAN AND PAIGE, P.C.**

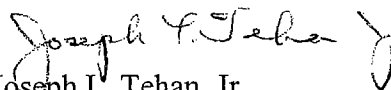
Timothy J. Perry, Esq.

January 19, 2006

Page 2

I have spoken with Attorney Mulcahey and he has advised that he, too, shall attend the deposition as scheduled.

Very truly yours,

  
Joseph L. Tehan, Jr.

JLT/er

cc: Charles D. Mulcahy, Esq. (via facsimile – 508-822-4097)

271842/METG/0629

**PretiFlaherty**

TIMOTHY J. PERRY

[tperry@preti.com](mailto:tperry@preti.com)

January 19, 2006

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31 St. James Avenue  
Boston, MA 02116-4102

Re: Bates v. Town of Harwich et al.  
CA No.: 1:05-cv-10489MEL

Dear Mr. Mulcahy and Mr. Tehan:

I respond to Mr. Tehan's letter of this date. The letter is disingenuous. It attempts to create a record that is inaccurate. Given that Mr. Bates has agreed to depose each of your clients at dates and times convenient to you, I also believe your position to be inappropriate.

As I discussed with Mr. Tehan, there is only a Court Order for the deposition to occur on January 23, 2006 because my client *assented* to your request for that Order. The Court has stated no interest in January 23, 2006 as drop-dead date for the deposition. Attempting to use the Court Order to capitalize on Mr. Bates' misfortune is not right.

Moreover, there has not been the pattern of non-compliance with discovery you suggest. Mr. Bates has answered document requests, and as stated therein, the documents are available for your inspection at any time. This is Mr. Bates' sole responsibility for document production. *See* Rule 34. With respect to interrogatories, this is the first I am hearing that you believe that the interrogatories are an issue. In any event, they shall be produced before Plaintiff's deposition.

As you know, Mr. Bates is unable to attend his deposition because he is indigent, lives in a boarding house in Franconia, New Hampshire and will not have funds sufficient

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[www.preti.com](http://www.preti.com)**EXHIBIT D**

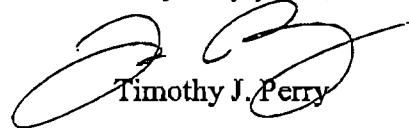


to come to Boston until February 1, 2006. Therefore, he cannot appear on January 23, 2006 for the deposition. Since Mr. Tehan stated that he would not allow a short continuance of the deposition unless I moved for a protective order, an emergency motion was filed today.

In any event, I suggest that you not waste time and resources "appearing" at the deposition Monday when you know Mr. Bates cannot make it. Of course, as you made clear today, I cannot control your attempt to capitalize on this issue. Since you are on notice that Mr. Bates will be unable to appear, however, any attempt to seek trumped up costs for "appearing" on Monday shall be vigorously opposed.

As a professional, Mr. Tehan's position disappoints me – especially when each of your clients have been granted courtesies by me. Indeed, we have thus far attempted to refrain from a deposition of the Town through document production alone. Nonetheless, I continue to be available to discuss this matter as a professional if either of you desire. Please call me with any questions.

Very truly yours,



Timothy J. Perry

cc: Glenn Bates